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FREEDOM AND MR. JUSTICE BLACK: THE RECORD AFTER TWENTY YEARS

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Hugo L. Black, in his first twenty years as an Associate Justice of the United States Supreme Court, has proved in many ways that he is an optimist about human nature. He has a Jeffersonian faith that, if the channels of communication are kept open, the people will in the long run make enlightened decisions. The only persons about whose nature he is pessimistic are those who possess inordinate power over others. He accepts unreservedly Lord Acton's warning about the corrupting effects of power. While he recognizes the need for government, he fears what government will do. He understands that it must have power over the economic life of its people, but he refuses to concede that it can exercise any concomitant power over their minds.

To Black it appears that the United States Constitution contains the ideal solution. Section 8 of article I is a broad *grant* of power: the Government can do what is necessary in the economic realm. The first amendment is an absolute *denial* of power: the Government can do nothing to curb the freedoms of speech, press and religion.

I.

Black never tires of repeating that the command of the first amendment is unequivocal. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." to him is wording "as precise as the Framers could have used." It admits no exception. It marks out "an area over which Government should have no power at all."[1]

Since the Government is denied any power to hamper free expression,[2] the people's right to speak on public questions is inviolable. It is not exer-

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1. Address by Justice Black, Swarthmore College Commencement, June 6, 1955.

2. Address by Justice Black, University of New Mexico, October 4, 1952, in 5 J. LEGAL ED. 417 (1953).

cised at the sufferance of the State.[3] Legislatures, courts and all other governmental agencies cannot abridge it,[4] and no majority can be great enough to throttle it.[5] The first amendment absolutely forbids suppression of free speech, "without any 'ifs' or 'buts' or 'whereases.' "[6] It must be taken as a command "of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[7]

Black believes that, because of its absolute and unequivocal character,[8] the first amendment has a "preferred position" in the hierarchy of constitutional rights.[9] The Justice is fond of comparing the first amendment with the body's most vital organ. It is "the very heart of the Bill of Rights . . . ,"[10] "the heart of our free system of government. . . ."[11] He has explained the metaphor thus: "Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."[12]

Many people believe that a governmental policy of unfettered communication of ideals entails certain dangers. Black agrees. He points out, however, that "the Founders weighed the risks involved . . . and deliberately chose to stake this Government's security and life upon preserving liberty to discuss public affairs intact and untouchable by government."[13] He thinks that the founders made the correct decision, and he does not believe that the risk they took is very great. He is confident that "our free institutions can be maintained without proscribing or penalizing political beliefs, speech, press, assembly, or party affiliation."[14] He certainly is not afraid "that

3. Address by Justice Black, Albert Einstein Memorial Meeting, New York, May 15, 1955.
4. Wieman v. Updegraff, 344 U.S. 183, 194 (1952) (concurring opinion).
5. Adler v. Board of Educ., 342 U.S. 485, 497 (1952) (dissenting opinion).
6. Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (dissenting opinion).
7. Bridges v. California, 314 U.S. 252, 263 (1941).
8. Its rights cannot be taken away by merely satisfying the due process requirement. See Cahn, *The Firstness of the First Amendment*, 65 YALE L. J. 464, 470 (1956).
9. Breard v. Alexandria, 341 U.S. 622, 650 (1951) (dissenting opinion); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Dennis v. United States, 341 U.S. 494, 581 (1951) (dissenting opinion).
10. Swarthmore address, *supra* note 1.
11. Einstein Memorial address, *supra* note 3.
12. Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 301-02 (1941) (dissenting opinion).
13. Swarthmore address, *supra* note 1. Black would have voided that section of the Hatch Act which bars government workers from political activity. United Pub. Workers v. Mitchell, 330 U.S. 75, 105 (1947) (dissenting opinion).
14. American Communications Ass'n v. Douds, 339 U.S. 382, 452 (1950) (dissenting opinion).

a mere speech of any man or group of men could destroy this nation."[15] But he understands why many are fearful of free speech. It does pose a real menace to despotic rulers,[16] to beneficiaries of the *status quo*[17] and to "arrogant public officers, false policies, and bad laws. . . ."[18] As far as the people as a whole are concerned, they can only benefit from free discussion. Any attempt to stifle it deprives them of information and argument that may be of value to them.[19] When government supervises and limits the flow of ideas, people can be molded into robots possessing a uniform intellectual outlook. A "hands-off" policy toward the minds of men, on the other hand, encourages "varied intellectual outlooks. . . ."[20] Such a policy is an absolute prerequisite if "vigorous enlightenment" is ever to triumph over "slothful ignorance."[21]

Black holds to the belief that absolute first amendment freedoms actually strengthen a country. He has stated categorically that "the Nation's security lies in the undiluted right of individuals to exercise their First Amendment freedoms."[22] Above all, he is convinced that "without these freedoms and without the philosophy on which they rest a country would not be worth living in."[23] This, it may be noted, was also the attitude of Jefferson, who said: "I would rather be exposed to the inconveniences attending too much liberty, than those attending too small a degree of it."[24] Black agrees that, since free speech is so precious a possession, it is worth the cost in comfort and convenience that it may sometimes involve. Sound-trucks, for example, may emit loud and raucous noises; but it is far better to suffer auditory discomfort than to relieve it by closing the mouths of people who have something to say.[25] The man who works at night and must sleep in the daytime is to be pitied if he is awakened by a bellringer offering a religious circular. But no city has the right to stop the admittedly irritating canvasser. Each person may decide for himself whether to let

15. Einstein Memorial address, *supra* note 3.
16. Swarthmore address, *supra* note 1.
17. Wieman v. Updegraff, 344 U.S. 183, 194 (1952) (concurring opinion).
18. University of New Mexico address, *supra* note 2.
19. Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 730 (1942) (dissenting opinion).
20. Adler v. Board of Educ., *supra* note 5, at 497.
21. Martin v. Struthers, 319 U.S. 141, 143 (1943).
22. Swarthmore address, *supra* note 1.
23. Einstein Memorial address, *supra* note 3.
24. Quoted in THOMAS JEFFERSON ON DEMOCRACY 51 (Padover ed. 1953).
25. Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (dissenting opinion).

the stranger in. The community as a whole cannot make that decision for all its inhabitants.[26]

Black considers it tremendously important not to hinder the bellringer, the soundtruck operator or the soapbox orator. Often these are men of modest means who cannot afford more expensive communication media. In Black's words, "door to door distribution of circulars is essential to the poorly financed causes of little people."[27] Soundtrucks are often the only outlet for those "who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places."[28] When even a soundtruck is unavailable, people like these often resort to the soapbox to broadcast their thoughts. Should a street-corner orator get his audience angry enough to riot against him, Black would have the police defend the speaker and let him continue. Police "protection" of the speaker should not take the form of muzzling him. For if the police are given the right to silence a speaker "as soon as the customary hostility to his views develops," the Constitution is mocked and a "long step toward totalitarian authority is taken."[29]

In Black's view, one cannot be punished by the law for exercising his right to speak. By the same token, no disabilities of any kind should accrue to those who take advantage of their constitutional prerogatives. Black has declared: "Unless people can freely exercise those liberties, without loss of good name, job, property, liberty or life, a good society cannot exist."[30] Thinking and speaking should not be made dangerous.[31]

Black believes that the Constitution prevents the States, as well as the federal government, from interfering with fundamental freedoms, because the fourteenth amendment was meant to apply the entire Bill of Rights to the States.[32] The Justice first announced this thesis in 1947.[33] Study of the fourteenth amendment persuaded him that "one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights

26. Martin v. Struthers, 319 U.S. 141 (1943).
27. *Id.* at 146.
28. Kovacs v. Cooper, *supra* note 25, at 102.
29. Feiner v. New York, 340 U.S. 315, 323, 329 (1951) (dissenting opinion).
30. Swarthmore address, *supra* note 1.
31. Adler v. Board of Educ., *supra* note 5, at 496.
32. *Id.* at 497.
33. Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion).

applicable to the states."[34] Black knew that he was blazing new trails, since the Court had never given this idea full consideration or exposition.[35] The Justices had chosen to proceed on a selective basis, applying some Bill of Rights provisions to the States but refusing to apply others.[36] Thus, states had been held powerless to abridge freedom of speech or of the press,[37] but were not considered bound to proceed through grand jury indictment in criminal cases;[38] states could not take property without just compensation,[39] but could encroach on the privilege against self-incrimination.[40] Black could see no rationale for this crazy quilt approach. The Court, as he saw it, had not comprehended the historical purpose of the fourteenth amendment. As a result, the Justices had arrogated to themselves the power to expand and contract constitutional safeguards at will. Their criterion of constitutionality seemed to be their personal notions of "civilized decency." Black rejected the natural law theory on which he said this usurpation of power rested. He called it "an incongruous excrescence on our Constitution. . . ."[41] Like a religious fundamentalist, he was interested in the original text and context, not in later interpretations. He concluded that the States were as much prohibited from interfering with the freedoms guaranteed in the first ten amendments as was the federal government.[42]

This theory was later applied by Black to a case in which the Court upheld an Illinois race libel statute, under which a distributor of anti-Negro

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34. *Id.* at 71-72.
35. *Id.* at 72.
36. See DOUGLAS, WE THE JUDGES 264 (1956).
37. Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).
38. Hurtado v. California, 110 U.S. 516 (1884).
39. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).
40. Twining v. New Jersey, 211 U.S. 78 (1908). Cases antedating Black's dissent in the *Adamson* case had established also that states could not interfere with free assembly (De Jonge v. Oregon, 299 U.S. 353 (1937)) or religious freedom (Murdock v. Pennsylvania, 319 U.S. 105 (1943); Everson v. Board of Educ., 330 U.S. 1 (1947)). In addition, a state could not coerce prisoners into "confessing" (Brown v. Mississippi, 297 U.S. 278 (1936)).
41. Adamson v. California, *supra* note 33, at 75.
42. The Supreme Court has never accepted Black's theory. Scholarly opinion on the subject is divided. H. E. Flack, for example, adduces evidence to support the view that the framers of the fourteenth amendment meant it to "make the first eight Amendments binding upon the States. . . ." FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 82 (1908). For an opposing viewpoint, see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949) and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

leaflets had been convicted.[43] Dissenting from the Court's judgment, Black refused to concede that any public issues were so well settled that they were beyond the pale of free discussion. No legislature had the power to select the questions that Americans could debate, for that was "the individual's choice, not the state's." Tampering with free speech was not the way to solve social issues.[44] Holding the theory that first amendment freedoms were absolute, Black thought that the Court was degrading the Constitution by putting precious rights "at the mercy of state legislative, executive, and judicial agencies." The motives of the statute's authors might be beyond reproach, but praiseworthy intentions have not always made good law. History indicated to Black that "urges to do good have led to the burning of books and to the burning of 'witches.'" The very concept of "race libel" was unsound, for libel as a legal term meant that an individual, not a large group, had been defamed. Stretching the concept to comprehend denunciation of "huge groups" might outlaw legitimate criticism of public officials, economic classes, or social systems. The reasoning which sustained Illinois' right to punish bigots could be used by other states to punish egalitarians, Black noted. Many members of oppressed minorities, however, were astounded at Black's position. Anticipating their reaction, the Justice said solemnly: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'"[45]

Black believes with Jefferson that "the opinions of men are not the object of civil government, nor under its jurisdiction. . . ." It follows that the state may not act to curb dangerous ideas even if it is convinced that their widespread acceptance might menace the *status quo*. In Jefferson's words: "it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. . . ."[46] Black's acceptance of this Jeffersonian principle leads him to reject Justice Holmes' "clear and present danger" doctrine. Holmes enunciated the principle during World War I. "The question in every case," he said, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger

43. Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (dissenting opinion).
44. *Id.* at 270.
45. *Id.* at 270, 274, 275.
46. THE COMPLETE JEFFERSON: *A Bill for Establishing Religious Freedom (1779)* 947 (Padover ed. 1943).

that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[47] Brandeis, who subscribed to Holmes' opinion, later amplified his point of view. "[N]o danger flowing from speech can be deemed clear and present," he declared, "unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."[48]

But who is to proclaim the existence of an "emergency"? To Black this is the rub. Black would give no one—neither Congress nor the courts—the power to announce the presence of a danger which justifies incursions into first amendment territory because he knows that each generation considers its witches real and their menace both clear and present. The best Black will say for the Holmes dictum is that it represents "a minimum compulsion of the Bill of Rights." It certainly does not "mark the furthermost constitutional boundaries of protected expression."[49] In order to avert a "clear and present danger" which often proves neither so clear nor so present as it appeared at the time, Black is unwilling to justify a truly clear and present danger to first amendment freedoms.

Black did not announce his opposition to the "clear and present danger" doctrine until after World War II.[50] During the war, as we shall see below, his libertarian position was not much in evidence in cases which appeared to involve the national security. Since he has never, in any sense, recanted his wartime opinions, his over-all stand is not so far from the Holmes formula as superficial appearances indicate. Holmes, too, was a brilliant exponent of the freedom of expression.[51] But the war made him formulate a theoretical justification for a partial moratorium on freedom. Black never subscribed to the theoretical formulation, but his inarticulate major premise

47. Schenck v. United States, 249 U.S. 47, 52 (1919).
48. Whitney v. California, 274 U.S. 357, 377 (1927).
49. Dennis v. United States, 341 U.S. 494, 580 (1951) (dissenting opinion).
50. *Id.* at 580.
51. "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by fair trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).

was the same: in wartime the Constitution, if not completely silent, at least does not speak above a whisper.

II.

Two important wartime freedom cases concerned those Americans of Japanese ancestry who were living in California during the war. Military authorities, allegedly fearing that a Japanese invasion of the West Coast was imminent, used the power Congress and the President had given them and applied a curfew to all "Japanese." Black voted for the Stone opinion which upheld the action.[52] The Court's other extreme libertarians—Douglas, Murphy and Rutledge—also sustained the military's action, although Murphy admitted that because of its racism the order could be compared with Hitler's decrees against the Jews.[53]

The Army did not confine itself to the imposition of a curfew. Eventually it ordered the total evacuation of all Japanese-Americans—whether citizens or aliens, loyal or disloyal—from the West Coast. When an apparently patriotic citizen violated the evacuation decree, he was sentenced to jail. The Supreme Court upheld the legality of the "relocation." This time it was Black, himself, who spoke for the Court.[54]

The setting up of relocation camps for the Japanese-Americans—next to incredible in a nation which liked to emphasize how different it was from its fascist enemies and their concentration camps—was justified by Lt. Gen. J. L. De Witt, head of the Western Defense Command, in the following words:

> The continued presence of a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion along a frontier vulnerable to attack constituted a menace which had to be dealt with. Their loyalties were unknown and time was of the essence.[55]

The claim that the Japanese-Americans represented a "menace" has been seriously challenged.[56] General De Witt issued the first evacuation order in March 1942.[57] In the three months following the attack on Pearl Harbor,

52. Hirabayashi v. United States, 320 U.S. 81 (1943).
53. *Id.* 109-14 (concurring opinion).
54. Korematsu v. United States, 323 U.S. 214 (1944).
55. LT. GEN. J. L. DE WITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST vii (1942).
56. JACOBUS TENBROEK ET AL, PREJUDICE, WAR AND THE CONSTITUTION 326 (1954); MCWILLIAMS, PREJUDICE 126 (1945).
57. MCWILLIAMS, PREJUDICE 109 (1945).

not a single act of sabotage had taken place in Hawaii,[58] where the Japanese population was in an excellent position to aid the nation to which they were allegedly "bound . . . by strong ties of race, culture, custom and religion. . . ." The fact was that economic, family and personal considerations dictated the necessity of continued Japanese-American loyalty to the United States.[59] Why, then, was the evacuation ordered? Public hysteria, fanned by the Hearst press and organizations like the American Legion may have been part of the answer.[60] The desire of California businessmen to pry the Japanese loose from their monopoly of the produce market may have been even more important.[61] And plain, old-fashioned bigotry clearly was another factor.[62]

The racism of the evacuation order was obvious, and Black in his opinion admitted that restrictions which follow racial lines should have "the most rigid scrutiny." But such restrictions are not automatically invalid, he continued. Pressing necessity may sometimes justify them. Accepting the Army's estimate of the military situation, Black found that this extenuating factor was present to justify the evacuation order. Afraid of espionage and sabotage, the military authorities had said that it was impracticable to investigate the loyalty of all Japanese-Americans. A blanket evacuation order was therefore the only possible recourse. Clearly the evacuees had suffered grievously, but "hardships are part of war, and war is an aggregation of hardships." The nation, said Black, did not have to remain helplessly paralyzed in the face of apparently imminent invasion. "[W]hen under conditions of modern warfare our shores are threatened by hostile forces," he declared, "the power to protect must be commensurate with the threatened danger."[63] Black asserted that it was unjustifiable to label as concentration camps the "relocation centers" to which the Japanese were forced to moved. He insisted that "to cast this case into outlines of racial prejudice, without reference to the real military dangers which were

58. *Id.* at 110.
59. *Id.* at 126.
60. *Id.* at 108.
61. Interview with Carey McWilliams, November 28, 1956.
62. General De Witt's benighted racial attitude can be inferred from his statement to the House Naval Affairs Subcommittee on April 13, 1943: "A Jap's a Jap. They are a dangerous element, whether loyal or not. There is no way to determine their loyalty. . . . It makes no difference whether he is an American; theoretically he is still a Japanese and you can't change him. . . . You can't change him by giving him a piece of paper." Quoted by McWILLIAMS, PREJUDICE 116 (1945).
63. Korematsu v. United States, *supra* note 54, at 216, 219, 220.

presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or to his race."[64]

Black was willing to give the evacuation order Supreme Court sanction rather than tempt the Government to declare martial law, which he believes is dangerous enough to be avoided at almost any cost. Although martial law is clearly illegal unless the courts have been forced to close,[65] it was proclaimed in Hawaii—whose civil courts were far from defunct—and almost five years elapsed before the Supreme Court (in an opinion by Black) announced that its imposition had been unlawful.[66] Time has not convinced either Black or Douglas[67] that they were wrong in placing the Court's imprimatur on the evacuation.[68]

In another wartime case, Black said that it was constitutional to require that a Nazi propagandist label his wares as being of German origin "so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source."[69] It is hard to imagine that anything but war could have convinced Black to sanction the law in question. But, at the time, the Justice refused to admit that any curtailment of constitutional freedom was involved. The legislation, he said, "implements rather than detracts from the prized freedoms guaranteed by the First Amendment" by helping people distinguish between "the true and the false."[70]

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64. *Id.* at 223.

65. "There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military." *Ex parte* Merryman, 17 Fed. Cas. 144, 152 (No. 9487) (C.C.D. Md. 1861). "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration. . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." *Ex parte* Milligan, 71 U.S. (2 Wall.) 2, 127 (1866).

66. Duncan v. Kahanamoku, 327 U.S. 304 (1946). The wartime attorney general of Hawaii points out that the federal government must have known all along that "the regime erected in Hawaii superseding the civil government was not only illegal but contrary to our most cherished traditions of the supremacy of the law." Anthony, *Hawaiian Martial Law in the Supreme Court,* 57 YALE L.J. 27, 52 (1947).

67. Interview with Justice Douglas, June 6, 1956.

68. Eugene V. Rostow, now Dean of the Yale Law School, considers Black's opinion in the Korematsu case "a disaster." The government's detention of the Japanese-Americans was even more reprehensible than the imprisonment of Milligan, he believes, for the Japanese were not even given the *military* trial that Milligan received. Rostow, *The Japanese American Cases—A Disaster,* 54 YALE L.J. 489, 527 (1945).

69. Viereck v. United States, 318 U.S. 236, 251 (1943) (dissenting opinion).

70. *Ibid.*

A governmental attempt to strip a Nazi of his citizenship won the approval of Black, although the Justice recognized "the dangers inherent in the denaturalizations."[71] Concurring with a Douglas opinion, Black said that one should not have his citizenship revoked for merely expressing sympathy with a philosophy. The defendant, however, had done far more than that. Among other things, he had solicited money for the German Winter Relief Fund and had helped organize a convention of the German-American Bund. These activities, in the opinion of Douglas, added up to a program of action to help the Nazis, of whom Knauer was a leader.[72] Black put it even more bluntly: Knauer had served "the German Government with the same fanatical zeal which motivated the saboteurs sent to the United States to wage war." Consequently he merited denaturalization.[73]

Black and Douglas were sufficiently carried away by the war to declare that one who had eaten with a Nazi saboteur and had held money for him was guilty of the overt acts that had to be proved for a treason conviction.[74] In a related case, Black agreed that the actual submarine saboteurs could be tried by a special military court and were not entitled to habeas corpus.[75] After the war, he voted with the majority to deny a Japanese general permission to file a habeas corpus petition challenging his trial by a military court on charges of not having prevented his men from committing atrocities in the Philippines.[76] And he also went along with a per curiam opinion that the Court could not review the judgments of a military tribunal established in occupied territory by the Supreme Commander of the Allied Powers.[77] But he did not approve the decision to set up the war-crimes tribunal at Nuremberg. Although he recognized that it may have been right to put the Nazi leaders to death, he did not feel that the device of a court trial should have been used. In his opinion,

71. Knauer v. United States, 328 U.S. 654, 674 (1946) (concurring opinion).
72. *Id.* at 661-69.
73. *Id.* at 674-75. Knauer, of course, had enjoyed the opportunity to contest the Government's allegations in open court. The case of another Bundist—August Klapprott—was quite different. A federal court cancelled Klapprott's citizenship because he did not make a timely appearance in court to answer the Government's complaint against him. During part of the time allowed, however, Klapprott was in jail on federal criminal charges. In addition, he was racked by illness and had neither lawyer nor money. Black's opinion set aside the denaturalization order. Klapprott v. United States, 335 U.S. 601, 614 (1949).
74. Cramer v. United States, 325 U.S. 1, 48 (1945).
75. *Ex parte* Richard Quirin, 317 U.S. 1 (1942).
76. Matter of Yamashita, 327 U.S. 1 (1946).
77. Hirota v. MacArthur, 338 U.S. 197 (1949).

the vengeance of the victors should not have been confused with impartial justice. The confusion, he believes, only demeaned the judicial process.

Once the war was over, it did not take Black long to revert to libertarian type. In addition to his opinion in *Klapprott v. United States*,[78] he refused to send German-American Bundists to jail for speaking against the Selective Service Act, which had discriminated against them concerning the wartime hiring of workers,[79] and he denounced the wartime declaration of martial law in Hawaii.[80]

III.

During the cold war, Black was an unrelenting opponent of all repressive legislation. His attitude was quite different from the position he had adopted in World War II. The explanation of the discrepancy is evidently that he considered the two periods quite different in terms of relative dangers posed to the United States. Clearly there was a significant differentiation. The glowering, posturing and jockeying of the cold war, however close to the brink of disaster they may have brought the world, could not be compared with the life and death struggle of World War II. Even during the Korean war, in which Black did not favor this country's intervention, Americans generally felt that the stakes were not so great as in the war against fascism. In spite of this, the cold war repression was far more severe than anything practiced during World War II.

Black was firm in his opposition to such repression. He was horrified at the "national network of laws aimed at coercing and controlling the minds of men."[81] Only during the years of the Alien and Sedition Acts, he recalled, were American freedoms in so much jeopardy.[82] Black considered it quixotic to imagine that the rights of Communists could be trampled upon without abridging the rights of all. Freedom, he maintained, is indivisible. Repressive laws generate uncontrollable hatreds and prejudices. As Black phrased it: "[R]estrictions imposed on proscribed groups are seldom static, even though the rate of expansion may not move in geometric progression from discrimination to arm-band to ghetto and worse."[83] The Justice felt

78. 335 U.S. 601 (1948).
79. Keegan v. United States, 325 U.S. 478, 495 (1945) (dissenting opinion).
80. Duncan v. Kahanamoku, *supra* note 66.
81. Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (dissenting opinion).
82. Einstein Memorial address, *supra* note 3.
83. American Communications Ass'n v. Douds, 339 U.S. 382, 449 (1950) (dissenting opinion).

that phobias inspired by loyalty oaths and witch hunts could demoralize a nation, for "popular indignation tars with the same brush all those who have ever been associated with any member of the group under attack or who hold a view which, though supported by revered Americans as essential to democracy, has been adopted by that group for its own purposes."[84] It is necessary, he insisted, to "have freedom of speech for all or we will in the long run have it for none but the cringing and the craven."[85]

Perhaps the most significant case of the postwar period was the one in which the Supreme Court upheld the constitutionality of the Smith Act, under which 108 leaders[86] have thus far been convicted for "conspiring to advocate" the forcible overthrow of the Government. The Court of Appeals for the Second Circuit, in a 1950 opinion by Judge Learned Hand, had sustained the statute.[87] Hand claimed to be troubled by the realization that the Act punished people for expressing their beliefs. But, he announced, the utterances of the Communists were not merely an effort to change people's beliefs; they also constituted a call to listeners to act when they were convinced. Hand said that the "clear and present danger" rule did not apply because "direct instigation" was involved.[88] When the case reached the Supreme Court, Chief Justice Vinson affirmed Hand's decision.[89] Vinson's interpretation of the "clear and present danger" rule made it something quite different from what it had meant to Holmes and Brandeis. Vinson said the rule could not mean "that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited." As far as he was concerned, conspiracy to organize the Communist Party and to teach and advocate overthrow of the government by force and violence created a danger which justified abridgments of free speech. "It is the existence of the conspiracy which creates the danger," he said. In such a case, Vinson ruled, the judge can find that a clear and present danger to the nation exists; the jury need not be consulted on this point.[90]

Two supposedly liberal justices—Frankfurter and Jackson—voted with

84. *Id.* at 448-49.
85. Wieman v. Updegraff, *supra* note 81.
86. As of August 1, 1956.
87. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950). Hand has never voted to declare a federal statute unconstitutional.
88. 183 F.2d at 209.
89. Dennis v. United States, 341 U.S. 494 (1951).
90. *Id.* at 509, 511.

Vinson but wrote separate concurrences. Frankfurter saw a conflict between the individual's right to speak and the Government's right to protect itself. Never a man to use one word where twenty sesquipedalianisms will do as well, he declaimed: "This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict."[91] The proper agency to resolve the conflict of interests, according to Frankfurter, is Congress. Clearly this means that, despite the first amendment, Congress can abridge free expression whenever it feels that public security demands it. But Frankfurter would not admit that his viewpoint represented a departure from first amendment principles. The amendment, he said, does not convey an "unfettered right of expression." Those who interpret the amendment literally, he added, are treating the words of the Constitution "as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future."[92]

Jackson, in his concurrence, denied that either the "clear and present danger" doctrine or the first amendment applied. As far as he was concerned, the Court was dealing with a simple conspiracy case. Jackson brushed aside the argument that free speech was involved. Naturally, he said, a conspiracy "usually consists of words . . ." but "there is no constitutional right to 'gang up' on the Government."[93]

Black despaired of explaining to these Justices the enormity of what they had done. "[M]y basic disagreement with the Court . . . springs from a fundamental difference in constitutional approach," he said. "Consequently, it would serve no useful purpose to state my position at length." He contented himself with stating, on behalf of himself and Justice Douglas, that the first amendment was more than a mere admonition to Congress. The way the amendment was being construed by the Court, he pointed out, it was no longer "likely to protect any but those 'safe' or orthodox views which rarely need its protection." Black knew that there would be no great popular outcry against the Court's emasculation of the first amendment. "Public opinion being what it now is," he said, "few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or

91. *Id.* at 519 (concurring opinion).
92. *Id.* at 521.
93. *Id.* at 575, 577.

some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[94]

The Smith Act was applied only to Communists and Trotskyists. The Government's employee-security program, however, affected millions of federal workers. For many it meant loss of job and reputation, and the agony of waiting until a departmental official concluded his evaluation of undisclosed charges by anonymous informants. In 1955, when a doctor challenged his dismissal from the Public Health Service, the Supreme Court had a chance to rule on the legality of the program.[95] The Court, however, chose to avoid the constitutional issue and upheld Dr. Peters on technical grounds. Black would have met the question squarely.[96] In a concurring opinion he wrote: "I want it distinctly understood that I have grave doubt as to whether the Presidential Order [Executive Order No. 9835] has been authorized by any Act of Congress. That order and others associated with it embody a broad, far-reaching espionage program over government employees. These orders look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of Congress. I also doubt that the Congress could delegate power to do what the President has attempted to do in the Executive Order. . . ."[97]

The order in question had been interpreted by Attorney General Tom Clark—later Black's colleague on the bench—as an authorization to draw up a list of "subversive" organizations for the guidance of Government bureaus. Black thought that Clark had exceeded his authority. He condemned the Attorney General's list unreservedly. It smacked of "a most evil type of censorship," because it punished people for their "political beliefs and utterances."[98] Black pointed out that the Attorney General, by "arbitrary fiat," could wipe out political, social, religious, or business groups that he disliked. "In the present climate of public opinion" the Justice explained, "it appears certain that the Attorney General's much publicized findings, regardless of their truth or falsity, are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political or religious prestige and influence."[99]

94. *Id.* at 580, 581. (dissenting opinion).
95. Peters v. Hobby, 349 U.S. 331 (1955).
96. *Id.* at 349 (concurring opinion).
97. *Id.* at 350.
98. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143 (1951) (concurring opinion).
99. *Id.* at 142.

Black did not believe that the security of the nation had been enhanced by the Attorney General's list. As he viewed it, the list was a long step away from genuine internal security. He wrote:

> In this day when prejudice, hate and fear are constantly invoked to justify irresponsible smears and persecution of persons even faintly suspected of entertaining unpopular views, it may be futile to suggest that the cause of internal security would be fostered, not hurt, by faithful adherence to our constitutional guaranties of individual liberty.[100]

In his opinion, Black said that the Attorney General's list was similar to a bill of attainder, although it was an executive rather than a legislative action.[101] Five years earlier Black had spoken for the Court as it struck down a more conventional attainder.[102] Congress had cut off the pay of a few Government workers whose allegedly left-wing views it disapproved. The device used was a rider on an urgent deficiency appropriation bill. Black ruled that the men had been convicted without a judicial trial. Their punishment, he argued, was as galling and effective as a criminal finding would have been. Legislative trials and punishments were "too dangerous to liberty to exist in the nation of free men."[103]

Within a few years, however, legislative trials had become a commonplace. The House Committee on Un-American Activities and Senator Joseph R. McCarthy's Permanent Subcommittee on Investigations crucified countless "unfriendly" witnesses. The only way that a person summoned by such a committee could with impunity avoid an inquisition into his political beliefs and associations was to invoke the protection of the fifth amendment —the constitutional privilege against self-incrimination. Historically and logically no inference of guilt could be drawn from one's refusal to answer. Senator McCarthy, however, labelled silent witnesses "Fifth Amendment Communists," and those so branded had to endure scorn and obloquy. But the fifth amendment continued to frustrate congressional heresy-hunters, for it at least offered assurance that a witness would not go to jail for answers he gave or declined to give.

In 1955, when public misunderstanding of the fifth amendment was at its zenith, the Supreme Court ignored the prevailing atmosphere and

100. *Id.* at 145.
101. *Id.* at 144.
102. United States v. Lovett, 328 U.S. 303 (1946).
103. *Id.* at 318.

broadened the coverage of the self-incrimination privilege as invoked before congressional committees.[104] Chief Justice Warren reversed the contempt conviction of a witness who had stood on his constitutional prerogative. Warren ruled that the man had properly invoked the fifth amendment even though he had declared merely that he was using the same ground as previous witnesses.[105] In a companion case, the Court vindicated a witness who had stood silent before a congressional committee although he had expressed the opinion that his answers would not have subjected him to criminal prosecution, and although his refusal to respond was based on "primarily the first amendment, supplemented by the fifth."[106] The Court, in an opinion by Black, held that the witness had not waived his privilege by his statement that an answer would not be incriminating. The committee could not validly hold the witness in contempt unless he remained silent in the face of an explicit warning that his claim of privilege was unacceptable, the Justices maintained.

In a dissent four years earlier, Black had shown no sympathy with those who wanted to constrict the coverage of the fifth amendment.[107] The case concerned a woman who, after testifying that she was a treasurer in the Communist Party, declined to reveal the identity of a person to whom she had turned over her books and records. The Court held that the witness had waived her privilege by admitting that she was a Communist official. In his dissenting opinion, Black took cognizance of the campaign to discredit the self-incrimination privilege. He knew that some people considered the fifth amendment "an outmoded relic of past fears generated by ancient inquisitorial practices that could not possibly happen here." Those hostile to the privilege thought of it, at best, as "more or less of a constitutional nuisance which the courts should abate whenever or however possible."[108] Black claimed that the majority opinion was creating this dilemma for witnesses: "On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question." Even a lawyer might

104. Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955).
105. Quinn v. United States, *supra* note 104.
106. Emspak v. United States, *supra* note 104, at 193.
107. Rogers v. United States, 340 U.S. 367 (1951).
108. *Id.* at 376 (dissenting opinion).

be in doubt as to the proper moment for asserting the self-incrimination privilege.[109]

But the fifth amendment still provided enough protection to continue infuriating the legislative and executive branches. In 1954, at the behest of Attorney General Herbert Brownell, Congress passed an "Immunity Act" designed to circumvent the self-incrimination claim in cases allegedly involving subversion.[110] Under the new law, a judge could grant a witness immunity from prosecution if the Attorney General certified that the testimony was "necessary to the public interest." The theory was that, with the threat of prosecution removed, the witness could no longer claim that an answer might incriminate him. When the constitutionality of the Act came before the Supreme Court, a seven-to-two majority sustained it.[111] But Black agreed with Justice Douglas, who dissented vigorously. The grant of immunity, said Douglas, was an encroachment on the "right of silence," which the Constitution has placed "beyond the reach of Congress." A person forced to admit that he was a Communist would not be able to obtain a passport and would also be barred from employment in defense industry or the Government. In addition, he would incur public infamy and near-excommunication. No man should be forced to punish himself out of his own mouth, said Douglas.[112]

One of the most ubiquitous institutions of the cold war was the so-called loyalty oath. The issue of its constitutionality came before the Supreme Court in 1950. Congress, in the Taft-Hartley Act, had provided that unions whose officers did not file non-Communist affidavits would be denied the use of the National Labor Relations Board. Black dissented from a Vinson opinion which sustained the loyalty-oath section of the Act.[113] He took the occasion to outline the unsavory history of test oaths. Whenever they had been in vogue, he contended, "spies and informers found rewards far more tempting than truth."[114] The Communists were called foreign agents. The same accusation, Black noted, had been levelled against other groups, including the Catholics of sixteenth-century England and the Jeffersonians of eighteenth-century America. These past episodes teach us, according to Black, that "penalties should be imposed only for a person's own conduct,

109. *Id.* at 378.
110. 18 U.S.C. § 3486 (1958).
111. Ullmann v. United States, 350 U.S. 422 (1956).
112. *Id.* at 440-54.
113. American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
114. *Id.* at 447 (dissenting opinion).

not for his beliefs or for the conduct of others with whom he may associate. Guilt should not be imputed solely from association or affiliation with political parties or any other organization, however much we abhor the ideas which they advocate. . . ."[115] Black felt that the Court had shirked its clear duty. It had approved "thought-probing" and "thought espionage." It had "injected compromise into a field where the First Amendment forbids compromise." It had ignored "the postulate of the First Amendment..." that free institutions are too strong to be undermined by the exercise of those freedoms.[116]

In not a single cold war case did Black uphold the Government in a loyalty matter. He said that the United States had no right to induct a doctor into the Army under a medical-draft law and then deny him a commission because he refused to answer a question about membership in the Communist Party.[117] He wanted to invalidate New York's action in suspending the license of a doctor who had refused to give Congress the records of an organization on the Attorney General's list.[118] He thought that the Feinberg Act, under which New York was firing teachers with "subversive" connections, was unconstitutional.[119] He voted for an opinion that resulted in the scrapping of sedition statutes in 42 states on the ground that, in the Smith Act, Congress had pre-empted the field of anti-subversive legislation.[120] He helped clip the wings of a congressional investigating committee.[121] And he objected at every stage to the disposition of the Rosenberg espionage case, which he felt should have been reviewed on its merits by the Supreme Court.[122]

Black believes in unrestricted freedom of speech partly because he thinks it is "better to blow off than to shoot off." In this sense, he justifies free expression as a safety valve: it permits people whose frustration might otherwise impel them to direct action to "blow off steam" by criticizing existing institutions. But there is another argument for the first amendment

115. *Id.* at 452.
116. *Id.* at 448, 452.
117. Orloff v. Willoughby, 345 U.S. 83, 96-97 (1953) (dissenting opinion).
118. Barsky v. Board of Regents of New York, 347 U.S. 442, 458-63 (1954) (dissenting opinion).
119. Adler v. Board of Educ., 342 U.S. 485, 496-97 (1952) (dissenting opinion).
120. Pennsylvania v. Nelson, 350 U.S. 497 (1956).
121. Christoffel v. United States, 338 U.S. 84 (1949). See also United States v. Fleischman, 339 U.S. 349, 366 (1950) (dissenting opinion).
122. See, *inter alia,* Rosenberg v. Denno, 346 U.S. 271 (1953); Rosenberg v. United States, 346 U.S. 273, 296, 277 n.2 (1953); Rosenberg v. United States, 346 U.S. 322 (1953); Rosenberg v. United States, 346 U.S. 324 (1953).

that is more important to Black: he considers free expression the best insurance against tyranny. As long as men are free to protest, to remonstrate, to proselytize, the tyrant's grip will be infrequent and weak. Jefferson's words are accepted without qualification by Black: "Whenever the people are well-informed, they can be trusted with their own government; whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights."[123]

In his first twenty years as an Associate Justice, Black has applied the Jeffersonian analysis productively to the problems of a society which has come to think of freedom of expression as a luxury which an efficient nation cannot afford.

123. THOMAS JEFFERSON ON DEMOCRACY 160 (Padover ed. 1953).